No. 80-5060

# In the Supreme Court of the United States

OCTOBER TERM, 1980

LONNIE JOE CARTER,

*Petitioner,*

—*v.*—

COMMONWEALTH OF KENTUCKY,

*Respondent,*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

## JOINT APPENDIX


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PETITION FOR CERTIORARI FILED JULY 17, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| DATE | DOCKET ITEM |
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February 1, 1979– Lonnie Joe Carter was indicted by the Christian County Grand Jury for third degree burglary, allegedly committed on December 22, 1978, and for being a persistent felony offender.

May 17, 1979—Lonnie Joe Carter was tried by a jury and convicted of third degree burglary and of being a persistent felony offender in the first degree. Petitioner was sentenced by the jury to twenty years imprisonment.

June 1, 1979—Lonnie Joe Carter was sentenced to twenty years imprisonment. Final judgment entered by the Christian Circuit Court.

June 5, 1979—Lonnie Joe Carter filed a notice of appeal to the Supreme Court of Kentucky.

May 13, 1980—Supreme Court of Kentucky renders its opinion in Mr. Carter's case and affirms his conviction.

June 3, 1980—Supreme Court of Kentucky issues mandate in Lonnie Joe Carter's case.

CHRISTIAN CIRCUIT COURT

Ind. No. 79-CR-24

COMMONWEALTH OF KENTUCKY, PLAINTIFF

*vs.*

LONNIE JOE CARTER, DEFENDANT

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# TRANSCRIPT OF RECORD

CHRISTIAN CIRCUIT COURT

Indictment No. 79-CR-24

COUNT 1.

COMMONWEALTH OF KENTUCKY

*vs.*

LONNIE JOE CARTER, DEFENDANT(S)

KRS 511.040—Third Degree Burglary

532.080—Persistent Felony Offender

The grand jury charges:

On or about the 22nd day of December, 1978, in Christian County, Kentucky, the above named defendant(s) committed the offense of Third Degree Burglary by unlawfully entering the store building known as Young Hardware, with intent to commit a crime;

The Grand Jury further charges that the above named defendant has previously been convicted of 2 felonies; (1) Storehouse Breaking in Hopkinsville, Kentucky, for which crime he was sentenced to the State Penitentiary at Eddyville, Kentucky, on November 2, 1973, for a period of 3 years; (2) Knowingly Receiving Stolen Property Over $100.00 in Hopkinsville, Kentucky, for which crime he was sentenced to the State Penitentiary at Eddyville, Kentucky, on May 20, 1977, for a period of 5 years; that said prior convictions and Judgments are in full force and effect, never having been modified, vacated, appealed from or set aside; that the above named defendant is a Persistent Felony Offender under KRS

532.080 against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/ [Illegible]
Foreman

Bail $10,000.00 cash or prop. jail.

Presented by the Foreman of the Grand Jury to the said court in the presence of the entire Grand Jury and received from the Court by me and filed in open court this 1st day of February, 1979.

/s/ Jack Haddock
Clerk

WITNESSES

Off. Davis & Ellison
Mr. MacArthur

by /s/ Kathleen G. Restau
D.C.

Felix
17 Nov. 1939
Lee Haskell. Dec

5th "39 offered by the defendant and refused by the Court. Judge Stephen P. Murphy Jr.

Instruction Re: Defendants Testimony

The d is not compelled to Testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.

Burden of Proof.

In a Criminal case, the burden of proof always rests upon the prosecution The defendant is under no obligation to prove anything. The Prosecution must prove every element of its case beyond a reasonable doubt.

Circumstantial Evidence –

An inference may not be built upon an inference.

CHRISTIAN CIRCUIT COURT

Indictment No. 79-CR-24

COMMONWEALTH OF KENTUCKY, PLAINTIFF

*vs*:

LONNIE JOE CARTER, DEFENDANT

JURY INSTRUCTIONS THIRD DEGREE BURGLARY

I

You will find the defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this County on or about the 22nd day of December, 1978, and before the finding of the indictment herein, he entered the store building known as Young's Hardware at 112 East 6th Street in the City of Hopkinsville without permission from the owner or any other person authorized to give such permission;

(b) That in so doing he did not have such permission; mission;

AND

(c) That he did so with intention of committing a theft.

If the jury find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than one (1) year and nor more than 5 years, in your discretion.

/s/ Stephen P. White, Jr.
Judge
Christian Circuit Court

PREVIOUS PAGE WAS BLANK

II

The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

/s/ Stephen P. White, Jr.
Judge
Christian Circuit Court

The verdict of the jury must be unanimous and be signed by one of you as foreman. You may use one of the forms provided at the end of these instructions in writing your verdict.

(a) We the jury find the defendant not guilty.

_____
Foreman

(b) We the jury find the defendant guilty and fix his punishment at 2 year(s) in the penitentiary.

/s/ Terry W. Hamby
Foreman

CHRISTIAN CIRCUIT COURT

Hopkinsville, Ky, Date June 1, 1979

THE COMMONWEALTH OF KENTUCKY, PLAINTIFF

*vs.*

LONNIE JOE CARTER, DEFENDANT

JUDGMENT: On Indictment No. 79-CR-24

Count #1—THIRD DEGREE BURGLARY

Count #2—PERSISTENT FELONY OFFENDER

The defendant was this day brought into Court, was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, W. E. Rogers, III, who was present at sentenc-

_____

Attorney's name

ing, none being shown, it is adjudged that the defendant being 35 years of age, be taken by the Sheriff of Christian County, to the jail of Christian County and from there by the Sheriff of said county transferred to the custody of the Department of Corrections and to remain in their custody for the period of TWO (2) years on Count #1—TWENTY (20) years on Count #2—Sentence on Count #1 and Count #2 merged—Total—20 years. The Sheriff of said County shall transfer the defendant to the Department of Corrections at such location as the Department shall designate.

PROBATION DENIED. DEFENDANT TO RECEIVE CREDIT FOR 161 DAYS JAIL, EXCLUDING June 1, 1979.

(If this sentence is to run concurrently or consecutively with any other sentence, please complete the following) This sentence is to run.....with the

concurrently/consecutively

sentence of Indictment No. ..... of the ..... Circuit Court.

/s/ Stephen P. White, Jr.
Judge
Christian Circuit Court

I, Jack Haddock, Clerk of the Christian Circuit Court, do hereby certify that the foregoing judgment is a true and correct copy of the Judgment in the above styled case, entered on June 1, 1979.

Witness my hand as Clerk of the Christian Circuit Court, this June 1, 1979.

Jack Haddock
Circuit Court Clerk

By /s/ Kathleen G. Restau
D.C.

CHRISTIAN CIRCUIT COURT

Ind. No. 79-CR-24

COMMONWEALTH OF KENTUCKY, PLAINTIFF

*vs.*

LONNIE JOE CARTER, DEFENDANT

---

# TRANSCRIPT OF TRIAL

* * * *

[4] VOIRE DIRE EXAMINATION BY THE COURT:

Ladies and Gentlemen, as you heard me say in the beginning, this is a charge—an indictment against Lonnie Joe Carter who is the black man sitting next to his attorney there, Mr. Rogers. Mr. Carter has on a dark blue suit. He is charged with third degree burglary in this way. That on or about the 22nd day of December, 1978, in Christian County, Kentucky, he committed that offense by unlawfully entering the store building known as Young Hardware with the intent to commit a crime.

Q Now, Ladies and Gentlemen, let me ask you first the most obvious question. As you can see for yourself, this defendant is of another race and I want to know if any one of you 25 on account of that fact feel that you cannot give him a fair trial?

A All 25 jurors nodded they could.

Q Ladies and Gentlemen, you have heard me read what the charge involved. Do any of you know anything about the facts of this case? Have you read about it in the newspaper or heard about it on the radio or heard about it from street talk or from any source at all?

[5] A All 25 jurors nodded they had not.

Q Now, Ladies and Gentlemen, the defendant is represented by Mr. W. E. Rogers, III who sits there next to him. Has Mr. Rogers done any legal work for any one of you 25 people?

A 24 jurors nodded negatively; 1 juror, C. H. Grace advised that he had prepared income tax returns for him.

Q How far back was that, sir?

A How far back?

Q Yes, sir?

A C. H. Grace: Oh, about 3 years, I guess.

Q Would that have any effect on your opinion in this case? Can you confine your judgment to the facts and the law as you hear them here in the courtroom?

A C. H. Grace: Yes, sir.

Q You can lay that aside?

A C. H. Grace: Yes, sir.

Q The case will be prosecuted for the Commonwealth of Kentucky by Mr. Ruff and Mr. Kemp. Have either one of them done any legal work for any member of this panel?

A All 25 jurors nodded negatively.

Q Are any of you related by blood or marriage to Lonnie Joe Carter?

[6] A All 25 jurors nodded negatively.

Q Do any of you know Lonnie Joe Carter?

A All 25 jurors nodded negatively.

Q Are any of you related by blood or marriage to either Mr. Rogers, or Mr. Kemp or Mr. Ruff?

A All 25 jurors nodded negatively.

Q Now, have any of you people on the panel been the victims of any sort of crime or had any member of your family the victim of a crime?

A 24 jurors nodded negatively; 1 juror, Mary Rogers: My brother got killed in '76.

Q Here in this county?

A Mary Rogers: Yes, sir.

Q What is your name, please, mam?

A Mary Rogers.

Q Mary Rogers?

A Mary Rogers: Yes, sir.

Q Mrs. Rogers?

A Mary Rogers: Yes, sir.

Q Would that fact have any sort of bearing on your judgment in this case?

A Mary Rogers: No, sir.

Q It is obviously not connected with it in any way? But aside from that, would that influence your judgment either for or against this man in the trial of [7] this case?

A Mary Rogers: No, sir.

Q Anybody else?

A All other 24 jurors nodded negatively.

Q Have any of you 25 had members of your family or yourselves connected with any law enforcement agency, such as Sheriff's Department, City Police, State Police, or any other law agency?

A 22 jurors nodded negatively; Larry Kisselbaugh: My uncle is Sheriff of Logan County.

Q Your uncle is Sheriff of Logan County?

A Larry Kisselbaugh: Yes, sir.

Q Would that affect your judgment in any way, Mr. Kisselbaugh?

A Larry Kisselbaugh: No, sir.

Q Do you have any such—by reason of that any such prejudice against the defendant or in favor of what a law enforcement officer may say on the witness stand?

A Larry Kisselbaugh: No, sir.

Q You have an unbiased opinion in this case? You can be as fair to him as to the other side?

A Larry Kisselbaugh: Yes, sir.

A Linda Davidson: My brother-in-law used to be a Deputy Sheriff.

[8] Q He used to be a Deputy Sheriff?

A Linda Davidson: Yes, sir.

Q Who was he?

A Charlie Cooke.

Q Would that have any bearing on your judgment in this case?

A Linda Davidson: No.

Q Now, Ladies and Gentlemen, as you may have heard me explain before in the courtroom and you will find this in the jury instructions, the 12 of you that will eventually try this case. The fact that this man is under a charge or has been indicted has no weight against him as evidence. It is not evidence of his guilt and is not to be considered by you as evidence of his guilt. It is simply a part of the court process which starts, as I have said, the wheels turning to get the case started to be tried. It means nothing more than that. He sits there before you today presumed by the law to be as innocent

as anyone else in this courtroom. I want you to fully understand that. Sometimes it is not easy to do, but you are to put out of your mind the fact that he is accused of this crime to the point where you will consider him in any way guilty until and unless the Commonwealth meets its burden and by [9] that I mean the Commonwealth must prove his guilt to your satisfaction beyond a reasonable doubt and if they fail to do that, you should find him not guilty. Now, reasonable doubt means exactly what it says. There's nothing technical about it and it shouldn't give anybody any trouble. The 12 of you that wind up hearing this case when you hear all of the evidence and any one of you has a reasonable doubt as to his guilt, it is your duty to find him not guilty and it works the other way around. If the 12 of you are satisfied beyond a reasonable doubt from the evidence that he is guilty, then you should find him guilty. I might say further that though the 12 of you finally chosen, you make up a body of people, you are still individuals and you are entitled to and you are expected to reach your own individual opinion about this case back in the jury room. You are free to discuss it back there and argue with each other and listen to what the rest of the panel says and pay whatever attention you choose to what the rest say but you are still individuals and you are entitled to cast your own separate vote as to his guilt or innocence and that is your duty.

A All 25 jurors nodded affirmatively.

[10] Q Now, Ladies and Gentlemen, is there anything that I have not thought of that would bring out something in the back of your mind which you think would disqualify you in sitting in this case and giving this man a fair trial and the Commonwealth a fair trial, based solely on the evidence you hear in court, the Court's instructions and the argument of counsel? Sometimes there is something in your background that, of course, I don't know about and I don't ask these questions out

of curiosity, I am just trying to get a fair and impartial jury to try this case, as we do in all cases?

A All 25 jurors nodded in agreement to what the Court said.

THE COURT: Mr. Rogers and Mr. Kemp, will you step up here?

WHEREUPON, Mr. Rogers and Mr. Kemp approached the bench at which time the Court asked both counsel if there were any further questions that they wished him to ask the 25 prospective jurors to which counsel for both sides advised the Court that they had no other questions to be asked.

THE COURT: Gentlemen, I think the jury is qualified, and under the law the Commonwealth must first exercise its challenges.

* * * *

[22] OPENING STATEMENT TO THE JURY

BY HON. W. E. ROGERS, III:

Ladies and Gentlemen, my name is W. E. Rogers and I represent Lonnie Joe Carter.

Let me tell you a little bit about how this system works. If you listened to Mr. Ruff you are probably ready to put Lonnie Joe in the penitentiary. He read you a bill, a true bill that was issued by the Grand Jury. Now, the Grand Jury is a group of people that meet back here in a room and the defendant is not able or not allowed to present any of his testimony before this group of people. The only thing that the Grand Jury hears is the prosecution's proof and I would say approximately what Mr. Ruff has said to you. I suppose that most of you would issue a true bill if Mr. Ruff told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself.

Now, that is just completely contrary to our system of law. A man, as the Judge has already told you, a person is innocent until they are proved guilty and that's the duty of the prosecutor, to prove beyond a reasonable doubt to you that this man is guilty of the crime for which he is charged. Now that means that they got to prove beyond a reasonable doubt that Lonnie Joe Carter put his hand in [23] this hole in the side of the wall and took some objects out, on this particular night. As they will and as you have heard, they have got a lot of pieces tied up here but there are a lot of pieces that are missing too, a lot of links are missing. And, also, a good bit of testimony that they will present, I think, you will find that it is subject to interpretation and, also, some of the testimony that they will present to you, you have got to use your own judgment as to whether or not identifications have been made beyond a reasonable doubt.

So I ask you to remember one thing, that this is your duty as a citizen of this country being on the jury and remember that our system and probably the corner stone of it allows, or says that a person is innocent until they are proved guilty. Listen to this case with an open mind all the way through it and don't make up your mind until you have gone back into the room and until all of the evidence is in and I think if you will do that, that is all we can ask.

Thank you.

THE COURT: Mr. Ruff, you may call your first witness.

HON. GRADY RUFF: Judge, we call Officer Ellison.

[24] TESTIMONY FOR COMMONWEALTH:

DEBORAH K. ELLISON

Having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q Would you state your name to the jury, please?
A Officer Deborah K. Ellison.
Q Who do you work for, Miss Ellison?
A Hopkinsville Police Department.
Q How long have you been on the police department?
A About twenty (20) months.
Q Twenty (20) months?
A Yes, sir.
Q Miss Ellison, were you on duty on December 22, 1978, in the early morning hours?
A Yes, sir, I was.
Q What were you doing?
A I was on town patrol area.
Q Tell us what is town patrol?
A O.K. Town patrol covers the main downtown areas of the city and that was my area that night to cover.
Q I want to call your attention, Miss Ellison, to a [25] little bit before 2:00 a.m., say 1:50, somewhere around in there. What were the traffic conditions downtown? Was there anybody downtown to speak of?
A Well, there were several people on Virginia Street where the bars are but the majority of downtown was quiet.
Q And where were you about 1:50?
A I was on Sixth Street in between Main and Virginia.
Q And what were you doing?
A Just checking buildings; that's what our usual function is, just looking at buildings and making sure

the glass and everything is secured and the doors are secured.

Q Well, tell the jury then if anything unusual happened on that particular time.

A I was driving toward Virginia Street on Sixth at the time and I was going back and forth checking the doors and windows and I happened to look down the alleyway between Young Hardware Store and Edna's Furniture Store and I saw something but I didn't know what it was and I had to back the car up to take a better look at it and I hit the spotlight and shined it down the alleyway and I [26] saw two black males that were stooped along the side of the building. When they saw me they stood up and they both took off running north toward Fifth Street and I maneuvered the cruiser down through the alley to see what they were doing and I saw a hole knocked in the side of Young Hardware Store and I called for Officer Davis for I knew that he was in that area for I had just seen him and I tried to pursue the individuals. I took off through the alleyway, like I said, and there were two subjects, one was tall and thin, and was wearing rust colored slacks and a dark colored shirt and he was carrying some items in his hand and the other subject was short and stocky and he had a light colored type jersey shirt on and black slacks, or dark colored slacks anyway, and I went down the alley, like I said, after I called Officer Davis and the short subject he just disappeared. I lost track of him some time when I was looking at the hole in the side of the building. The other subject, the tall and thin one, he jumped through—there's a chain that runs across Mason-Pontiac lot—he jumped that [27] and he went down through the Mason-Pontiac lot toward Fourth Street and I was trying to get the car turned around to get back on to Virginia to cut him off at Fourth and when I came around there I had lost sight of him completely and I heard Officer Davis say that he had

the subject in custody at that time so I went back to the scene at Young Hardware.

Q How long would you say this took in minutes or seconds, Miss Ellison?

A It all happened, I would say, probably in less than three minutes. It took no time at all, less than two, maybe; it was quick.

Q Almost immediately, is that correct?

A Yes, sir.

Q Then you went back to the building, to the hole in the building, after you heard that Officer Davis had some one in custody, is that what you said you did?

A Yes, sir.

Q What did you find when you got back there?

A Well, when I had gone through the alley before there were some items lying there but I didn't know what they were and when I went back to the scene there were two coats laying [28] there and some items that were believed to be from the store and I called out to the—on the radio and they called Mack Arthur from Young Hardware and he came out and he identified the items that were laying on the ground as being from the store. They had come off the shelves there from inside, right inside the hole.

Q What did you do with the items and the jackets?

A The jackets I put—well, I tagged for evidence as—well, they were laying at the scene—they were part of the evidence of the crime and the other items I tagged and marked and we locked everything up in a vault.

Q Have they been at the police station ever since this happened?

A Yes, sir, they have been.

Q Do you have them with you this morning?

A Yes, sir.

Q I will hand you this bag and ask you what is in there (handing same to witness)?

A (Looking at plastic bag) It is a brown suede type coat.

Q Would you look at that, please, and see if you can identify it?

[29] A (Looking at same) Yes, sir that jacket was laying on the ground.

Q That is one of the jackets that was found there?

A Yes, sir.

Q Now, would you examine this one (exhibiting another jacket)? Can you identify that?

A (Looking at same) Yes, sir, that's the other one that was laying on the ground.

Q I will show you these two items here (showing same to witness). Can you identify these?

A (Looking at items) Yes, sir, both of those were laying on the ground just outside of the hole.

Q Are these the same two (referring to some hardware tools) that were identified by Mr. Arthur in your presence as having come out of his store?

A Yes, sir, they were.

Q Do you have any idea what that is?

A I don't know what it used for. I sure don't.

THE MON. GRADY RUFF: Judge, I would like to introduce all of this into evidence.

[30] THE COURT: Let them be so marked and filed.

OBJECTION BY HON. W. E. ROGERS, III: Judge, I don't believe a proper foundation has been laid for these particular things.

HON. GRADY RUFF: She said that is what she found in the alley, Your Honor.

HON. W. E. ROGERS, III: She didn't testify where they had been.

THE COURT: If the Court understands, there will be further evidence about them.

HON. GRADY RUFF: Yes, sir.

THE COURT: Then for the present I will OVERRULE THE OBJECTION, subject to further identification.

(JACKETS AND TOOLS FILED HEREWITH AND MARKED COMMONWEALTH'S EXHIBITS 1, 2, 3 AND 4).

Q Miss Ellison, did you examine the hole in the building that night?

A Yes, sir, I did.

Q At that time did you make any pictures?

A No, sir, the pictures were taken early that * * *.

* * * *

[34] * * * Your Honor, I would like for these to be passed around for the jury to look at.

THE COURT: All right, sir.

Q Miss Ellison, after you returned to the scene and you got these coats and the hardware what did you do then?

A Officer Davis brought the subject around for me to identify him.

Q Who did Officer Davis bring around?

A It was Lonnie Joe Carter.

Q Is Lonnie Joe Carter here?

A Yes, sir, he is.

Q Where is he?

A (Pointing to her right toward defense table) Right over there, sir.

Q Sitting next to Mr. Rogers?

A Yes, sir.

Q At that time were you able to identify Lonnie Joe Carter as the man you saw running away?

A Mr. Carter was wearing the same clothing, or appeared to be the same clothing, as the man I saw running had on.

Q And you saw, I believe you said, a tall thin man and a short chunky one?

[35] A Yes, sir.

Q How did you describe the clothing of the tall thin man?

A He had on a dark colored shirt and rust or orange color pants and he was carrying some items in his hands.

Q He was carrying some items in his hands?

A Yes, sir. In fact, one of them looked like a gym bag.

Q A gym bag?

A Or some type of a bag.

Q Could you tell what the other item in his hand was?

A No, sir, I couldn't.

Q Did the subject that you saw run off have on an outer garment or a coat of any kind?

A No, sir, he didn't.

Q Miss Ellison, do you remember what the weather conditions were that night?

A Yes, sir, it was rather cold. I couldn't tell you what the exact temperature was, but it was rather cold and a person would need to have a coat on that night.

Q This was December 22 of last year, right?

A Yes, sir.

[36] Q And you were able to state at that time and now that the clothes on Lonnie Joe Carter matched those or were similar in color, at least, as the ones that the man had on that ran off from the hole in the wall, is that correct?

A Yes, sir.

Q Did you ever have any conversation with Lonnie Joe Carter about this crime?

A No, sir, when we brought him down to the station he didn't want to say anything. There was another officer there who did say something about whose coats they were and Mr. Carter said that they were his coats.

OBJECTION BY HON. W. E. ROGERS, III: Judge, I object to the hearsay.

THE COURT: Yes, that is hearsay testimony and I believe you will have to get that from another party.

HON. GRADY RUFF: Well, Judge, I believe maybe we have misled her. Let me start over.

Q At the time you took Mr. Carter to the police station did you advise him of his rights and that he didn't have to make a statement and if [37] he wanted a lawyer?

A Yes, sir, I did.

Q At that time did he make a statement?

A No, sir, he did not and he would not waive a waiver certificate either.

Q And he refused and he did not want to make a statement?

A That's right, sir.

THE COURT: Just a minute, Mr. Ruff, let me ask a question.

HON. GRADY RUFF: All right.

THE COURT: Q Officer Ellison, at the time—when did you give him his Miranda rights?

A The moment we went back to the station.

Q That night?

A Yes, sir.

Q Did you give him his full Miranda rights?

A Yes, sir, we had the standard certificate and we read that to him.

Q And you gave him all of the elements of the Miranda Warning, did you?

A Yes, sir.

THE COURT: All right.

[38] DIRECT EXAMINATION (Cont'd).

QUESTIONS BY HON. GRADY RUFF:

Q Miss Ellison, do you have the form you filled out for his signature?

A Yes, sir.

Q (Referring to a document) Does this sheet here actually state you told him his rights were?

A (Looking at document) Yes, sir.

Q And did you then fill this out and present it to him for his signature?

A Yes, sir.

Q And he did not desire to sign that, is that correct?

A That's correct.

Q But you showed him what his rights were and he evidently understood them because he said that he did not want to make a statement, is that correct?

A Yes, sir.

HON. GRADY RUFF: Judge, I would like to introduce that as the standard Miranda Warning procedure.

THE COURT: Let it be so marked and received into evidence.

[39] (STATEMENT OF "YOUR RIGHTS" FILED HEREWITH AND MARKED AS COMMONWEALTH'S EXHIBIT 15).

Q Officer Ellison, after you had done this and he decided not to make a statement did Officer Colon, or rather Major Colon talk to him in your presence?

A Yes, sir, he did.

Q What did Major Colon ask him to do?

A He asked him if he was going to take the rap by himself.

Q Major Colon asked Lonnie Joe if he was going to take the full blame? In other words, the rap for this whole break-in by himself?

A Yes, sir.

Q And what did Lonnie Joe reply?

A He said: "Yeah, he was by himself."

Q And what did Colon say to him then?

A Colon asked him if both of those coats belonged to him and he said they did.

HON. GRADY RUFF: You may ask.

[40] CROSS EXAMINATION

QUESTIONS BY HON. W. E. ROGERS, III:

Q Officer Ellison, how long have you been on the police force?

A It has been about twenty (20) months.

Q Now, is that twenty (20) months until today?

A Yes, sir.

Q At the time of this incident this happened about four (4) months ago, is that right?

A Yes, sir.

Q So you had been on the force then for about sixteen (16) months?

A Yes, sir.

Q Was anybody else in the car with you on this night?

A No, sir, there was not.

Q Now you said that when you were coming down Sixth Street you happened to notice something in the alley. Do you remember what it was that attracted your attention?

A Well, o.k., that alley is usually completely empty. Usually, there is nothing in the pathway anyway and I looked down there and there was something there and I couldn't make out what it was.

[41] Q Did you have on your search light at that time?

A Not at that time, no, sir.

Q Where did your car stop in relation to the alley?

A I believe my door—my window had just passed the edge of the building and I glanced up and I went down—I couldn't understand what that was in the alleyway so I had to back up.

Q In other words, you had to back up in order to see down the alley?

A I had to back up to get a better look, yes, sir.

Q Is that when you turned on your flood light?

A Yes, sir, spotlight.

Q And where were these people that you saw?

A O.K., they were stooped down along the side of the building.

Q In what way were they stooped down?

A They looked like they were squatted down and when I hit the spotlight they both stood up.

Q Did they just stand up?

A They stood up. I think I surprised them as much as they surprised me. They stood up and looked straight at me and then they just took off running.

[42] Q This happened very quickly (snapping his fingers) like that?

A Yes, sir.

Q And they ran after they saw it was the police, is that right?

A I didn't hear you.

Q After they saw you were the police or after you turned the light on they ran, is that right?

A Yes, sir.

Q Now, you had to back your car up, didn't you, in order to make that turn into the alley there?

A I had already backed up when I went pass the first time and I had already backed up to see and then I hit the spotlight. I was backed up far enough to turn.

Q So you didn't have to back any further?

A No, sir.

Q Are you sure about that?

A Yes, sir, I am.

Q How wide is that alley?

A I really don't know for sure. I don't know offhand. I didn't measure it.

Q Well, would you say it is about 10 feet wide?

[43] A No, sir, it is wider than that.

Q It is a rather narrow alley, isn't it?

A It is one of the larger alleys that we have. It is probably the largest alley we have in town.

Q When you showed the picture to the jury, that shows a pick-up truck in that alley?

A Yes, sir.

Q I am going to show you a picture (this is Exhibit 13) and it shows a pick-up truck, and I presume that is the mouth of the alley, is that right (handing Exhibit 13 to witness)?

A (Looking at Exhibit 13) Yes, sir.

Q Now, in relation to this truck and this alleyway where was your car parked when you had on your search light?

A (Pointing to Exhibit 13) I had backed up to probably right here. It was about right here (pointing to same on Exhibit 13).

Q You are pointing to approximately where the tire is on the pick-up truck in the middle of the alley?

A Yes, sir.

Q Is that at the point where you were sitting in the car, about middleway there?

[44] A I couldn't tell you for sure. I am guessing to about where I had backed up to for everything was happening so quick I didn't. . . .

Q You are telling us you backed up enough so you could look down that alleyway?

A Yes, sir.

Q In your patrol car?

A Yes, sir.

Q And then were able to turn into this alley without backing up any more?

A I believe I was.

Q Do you believe or do you know whether or not you put it in reverse and. . .

A I may have maneuvered it around again. I really don't know for everything, like I said, happened so quick. I really wasn't thinking about how I was getting the car in there.

Q You noticed that the fellow ran away pretty quickly too, didn't you?

A Yes, sir.

Q So you had on your mind following them, didn't you?

A Yes, sir.

Q Did you ever consider getting out of the car and chasing them?

[45] A Yes, sir, I did.

Q But you decided not to do that, didn't you?

A I thought maybe if I could get the car through the alley and get on the other side of the buildings I at least could tell which direction they were headed. If I had gotten out on foot, one of them would have gone one way and the other one the other way.

Q Now, you described this other man to Mr. Ruff. Can you tell us what kind—what his features were; what he looked like?

A No, sir.

Q Did you ever attempt to work with the police artist in order to draw a picture of that man?

A No, sir, as I said, it was fairly dark in the alley and I didn't get a real close look of his face.

Q Do you remember what color pants he had on?

A Which one, sir?

Q The other man?

A Sir, they were dark colored.

Q Dark colored?

A Yes, sir.

Q Were they dark green?

A I couldn't tell. They were just a dark colored [46] pair of slacks.

Q And the other man had on light colored slacks?

A They were rust color; like an orange-brown.

Q You were able to tell the color of one of the man's pants but not of the other man's pants, is that right?

A Yes, sir.

Q Were you able to tell what the color of the shirt was that the other man had?

A Light and it looked like jersey. It might have been a light cream, blue or green.

Q Did he have a mustache?

A I couldn't tell you.

Q So you weren't able really to identify any of the features of either one of these men, is that right?

A No, sir, just their physical outline, height and width.

Q Did you radio these descriptions to Officer Davis when you picked up the microphone?

A I don't recall whether I actually told him a detailed description or not. I know I told him I had two subjects running—two black male subjects running toward Fourth through the alley. I don't recall if I gave him [47] clothing description or not.

Q Did you ever see either one of the subjects put his hand in this hole?

A No, sir.

Q Was the other man carrying anything?

A I didn't see anything.

Q When you went back to the scene—let me ask you this—how long was it—how long an interval of time was it between the time you went back to the wall and when you passed it?

A I would say maybe 2 minutes, approximately.

Q Two minutes?

A Approximately, yes, 2 or 3.

Q Didn't you follow either one of these subjects?

A The one subject, the short and heavier one, I lost sight of him the moment he hit the end of the alleyway.

Q Do you know which way he turned?

A He turned right going toward Virginia Street.

Q Now, these subjects were running away from you down the alley, is that right?

A Yes, sir.

Q From Fifth to Sixth?

A Yes, sir.

Q And you think one of them turned right?

[48] A Yes, sir.

Q Where did the other one go?

A I saw the tall thin one—there's a chain that runs across Mason-Pontiac—I saw him jump that and run through the Mason-Pontiac lot and I had to maneuver the car back out of the alley and go down Virginia Street. I was going to try to cut him off at Fourth and Virginia

Q So you turned right then out of the alley?

A Yes, sir.

Q You didn't see the other man then?

A No, sir, I did not.

Q And you think that he turned right also?

A Yes, sir.

Q Then where did you go?

A Well, I went down Fourth Street and I didn't see any sight of them so I turned back around and came up Virginia to go down Third and about the time I did that Officer Davis said he had one of them in custody.

Q Now you turned right on Fourth Street, is that right?

A No, I turned left on Fourth Street.

Q As if you were going to the Sheriff's office?

[49] A Yes, sir.

Q And then when you go to Main Street which way did you turn?

A I turned around and went back up Fourth Street.

Q You went back up Fourth to where?

A To Virginia.

Q Then where did you go?

A I started back up Virginia toward Third.

Q So you went up Virginia toward Third. Did you see Officer Davis and this subject?

A No, sir.

Q When did you get the radio call from Officer Davis that he had one of the subjects under arrest?

A It was right there while I was on Virginia Street headed toward Third, either before or after I got to Third. I really don't know for sure.

Q So then what did you do?

A When he said he had one of them in custody I drove straight back to the scene.

Q Were you on Virginia Street?

A I believe I was still on Virginia, yes. I don't believe I had made the turn into Third yet.

[50] Q Did you turn around and go back up Virginia?

A No, sir, I cut down Third then.

Q Down Third to Main?

A Yes, sir.

Q And then from Main back up to Sixth?

A Yes, sir.

Q And you say you did all of this in 2 or 3 minutes?

A Yes, sir.

Q Did you see the subject after he jumped this chain fence or whatever it was?

A I saw him running through the Mason-Pontiac lot there and when he hit the edge of the building I didn't see any more of him.

Q Did you see anybody else running?

A No, sir.

Q Was anybody else out on the streets?

A On Virginia Street up along the side of the bars there were people out there.

Q Did you ever go back up to these bars to check to see if you could find this other man?

A No, sir.

Q Can you describe to me and in a little bit better in detail what this other man looked like?

* * * *

[52] CROSS EXAMINATION (Cont'd).

QUESTIONS BY HON. W. E. ROGERS, III:

Q Miss Ellison, I think we were talking about the size of the other man and I was asking you if you could tell me how big he was. Could you tell me that in rela-

tion to Mr. Ruff, for instance? Was he as large as Mr. Ruff?

A He was probably about his height. He was a stocky man but he wasn't quite as stocky as Mr. Ruff.

Q Was he as stocky as Officer Davis?

A About that, yes, sir.

Q Now, you testified that the man, the other man that ran away did not have anything in his hands?

A I didn't say he didn't. I didn't see anything.

Q When you went back to the Young Hardware building did you make a thorough search of that area?

A Yes, sir.

Q Did you look behind the building?

A Yes, sir.

Q Did you look in the parking lot behind the building?

[53] A Yes, sir.

Q Did you look in the parking lot behind the buildings?

A I didn't myself. There were other officers searching in the area also. I didn't search the parking lot myself, no.

Q And the items that you have presented here today, are they the only items that you found?

A No, sir, there were some other items but Mr. Mack Arthur from Young Hardware, he took those up and stuck them back on the shelf before I got to them and I asked him what he did with them and he said that he put them back on the shelf.

Q Was he there when you got back to Young Hardware after . . .

A No, sir.

Q How long did it take him to get there?

A I really don't know. I don't know the time he got there.

Q Would it have been an hour possibly?

A No, it was less than that. I would say it was less than 30 minutes or 20 minutes.

Q Was Mr. Mack Arthur instructed not to touch these items?

[54] A O.K., we were afraid possibly there was someone in the building and when Mr. Mack Arthur got here he had unlocked the front door for us and we did a thorough search of the inside of the building first.

Q But you didn't answer my question. Do you know whether he had been instructed not to. . .

A I really don't know whether he had been or not.

Q When you left these items, you left them in the alleyway?

A Yes, sir, they were still laying in the alleyway.

Q You had not marked them for identification then?

A Not yet, no, sir.

Q Mr. Mack Arthur did not pick up these items then?

A No, sir, I had picked up some and I started putting them in the car—O.K., I began to do the search of the building, O.K. and it took a good 10 minutes, I would say, to do a good check of the building and I was standing outside of the front door at that time and there was another officer on the side of the building and where the hole and everything was and I don't remember who that was but then [55] after they said the building was clear I went back around the side and I picked up some items and put them in my cruiser.

Q Were these the items that you picked up and put in your cruiser (referring to Commonwealth's Exhibits 1, 2, 3 and 4)?

A (Looking at same) Yes, sir.

Q Do you know whether anybody else got any other items?

A No, sir, I don't.

Q In the search around Young Hardware and the surrounding grounds, did you ever find any tools with which a person could break into this building?

A No, sir.

Q You didn't find a crowbar?

A No, sir, we did not.

Q Do you know how long it had been since the police had checked Young Hardware before you had checked Young Hardware?

A I really don't know for sure. I know I had been in that area all night because of the bars, you know. We try to check the area every half hour and I couldn't tell you how long before I had been through there or another [56] officer had been.

Q Had you been down that alley previously that night?

A Not the alley, I had been down Sixth Street.

Q Do you remember flashing your light down the alley at that time?

A I don't recall.

Q How long was that before you discovered this break-in? How long, the previous time that you went by?

A I don't know. I have no idea.

Q Miss Ellison, do you ever wear glasses?

A No, sir.

Q Do you know whether or not there were any efforts made to fingerprint any of the items that were found outside of the Young Hardware?

A No, sir. We didn't try to take any fingerprints.

Q When you say these two men—I think you said earlier, that they didn't have their hands inside the building, is that right, when you saw them?

A You asked if I had seen them reaching inside the building. I hadn't seen it, no, sir.

Q Miss Ellison, when was the first time that you [57] saw Lonnie Carter this man here (referring to defendant seated at counsel table with his counsel) after you shined your light in the alley?

A Will you repeat that?

Q When was the first time—when did you see Lonnie Carter the first time?

A For the first time?

Q Yes, mam?

A Well, the man I saw in the alleyway fit Mr. Carter's description. Now, the first time I had seen Mr. Carter's face was when Officer Davis brought him back around to the scene.

Q Officer Davis brought him to Young Hardware?

A Yes, sir.

Q And you saw him there?

A Yes, sir.

Q And Officer Davis told you that this was the man that he had apprehended, is that right?

A Yes, sir.

Q Where was Lonnie Carter when he was brought over to Young Hardware? Was he in the squad car?

A Yes, sir.

Q Did he ever get out of the squad car?

[58] A Yes, sir, he did. In fact, Officer Beard did the transporting, transported Mr. Carter from Young Hardware to the station.

Q Did you see him get out of one car and into another?

A I believe I did, but I am not real positive.

Q At any rate, when you identified Lonnie Joe Carter you had been told this was the man that was stopped and brought over here?

A Yes, sir.

Q You didn't say "Yes, that's the man"?

A Sir?

Q When they brought him over there, did you say, "Yes, that's the man" ?

A I don't know if I said that or not. I looked at Mr. Carter and saw what he was wearing and what was the same description of the clothing subject had on when he was running.

Q Could you have picked Mr. Carter out of a line up?

A Only perhaps by height and weight and clothing for I never saw Mr. Carter's face when he was running.

HON. W. E. ROGERS, III: That's all.

[59] THE COURT: Any further questions, Mr. Ruff?
HON. GRADY RUFF: No, sir, Judge.

THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS DISMISSED AND WITHDREW.

LeROY DAVIS

Having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q State you name to the jury, please.
A LeRoy Davis.
Q Officer Davis, are you on the police department?
A Yes, I am.
Q How long have you been on the City Police Department?
[60] A About four and a half (4½) years.
Q Were you on duty in the early morning hours of December 22, 1978?
A Yes, I was.
Q Do you recall any unusual occurrence around Young Hardware in the early morning hours?
A Yes, I got a—I was sitting at Fifth and Virginia and I heard Officer Ellison give out a call that there were two black males in the alley behind—beside Young Hardware and that they were running toward Fifth Street. And, like I said, I was sitting at Fifth and Virginia and I saw them when they came out and both subjects ran toward the parking lot of Mason-Pontiac and so I turned right and saw the direction they were running and by the time I got about middleways one of the subjects doved back and I kept going and at Fourth and Virginia I looked left and one of the subjects kept running on across Fourth Street. There is an alley behind Stamm's Motel and he was going to that alley so I went on up Virginia Street and I made a lefthand turn on Third for I knew

the subject had to come out of that alley on that end and by the time I got to the [61] alley he was coming out on Virginia Street and I made a lefthand turn on Third for I knew the subject had to come out of the alley on that end and by the time I got to the alley he was coming out and I almost hit him and I told the subject to stop. He wouldn't stop. He just kept running so I got out and gave chase and I stopped him on Third and Virginia, right in front of the church.

Q I have drawn a little map on this board and I want you to show this jury just what you did.

A (Pointing to drawing on blackboard) Well, this is the alley beside Young Hardware and the way Officer Ellison described it to me the subject was running in this direction (pointing out same on drawing). I was sitting right here where I could see down Fifth Street and both subjects ran through this parking lot right here (pointing to drawing on board) and by the time I got here in my police car one of the subjects came back in this direction. I pulled down to Fourth Street and then I looked left and a subject was coming across and by the time he got behind Stamm Motel he went through here, through the alley right here [62] and when I turned on Third Street coming this direction (pointing out same on drawing on blackboard)—the alley probably comes out right here and this is where I pulled my police car right here (again pointing to drawing) and he ran right beside it and I told him to stop and he would not so I got out and chased him and there is a small lawn right about here (again pointing to drawing) and he stepped up on it and he had two items in his hands and he dropped them and he went around the corner and he was going so fast, well, he stumbled when he stepped back up on the curb and I told him to halt and he stopped and that's when I placed him under arrest.

Q Now, you say—I want to pick up on your testimony there—that running through that alley there and then crossing Fifth you saw him cross Fifth and go into Mason's parking lot, is that right?

A Right.

Q And then you went on and saw him cross Fourth?

A Yes, sir.

Q You were driving parallel, I suppose, to his running, is that correct?

[63] A Right.

Q You looked up Fourth Street and saw him cross?

A Right.

Q Is there an alley there that goes behind Stamm's Motel?

A Yes, there is.

Q And it comes out on Third Street?

A Right.

Q And I believe you stated that you drove to Third and turned down Third and stopped there at that alley?

A Right.

Q And that's when you saw him again?

A He came out of that alley.

Q How close did he run to your car?

A If I had opened the door a little sooner he would have run dead into it.

Q It was that close?

A Right.

Q Now, did you get out of your car at this point?

A After he went past.

Q After he went past?

A I opened the door and started chasing him.

Q You got out of the car and chased him on foot?

A Yes, I did.

[64] Q And you had already yelled to him to halt?

A Yes, I did, because I already had the window rolled down.

Q And you say that he ran up through the small lawn at the church?

A Yes, sir.

Q And he dropped two objects up there?

A Yes, he did.

Q What did he drop?

A One of them was a bag and one of them was a radio.

Q Was there anything unusual about the radio?

A Well, when we got it down to the station it was set on the police band and it also had an earphone that you could stick in your ear.

Q Now with a radio set on a police band would he be able or would anyone be able to turn the radio on and hear communications between the police department and cars?

A Yes, it would be just like having a scanner; anywhere we went they would know it.

Q If the station had called you and said there's a break-in going on at Young Hardware the person with the radio could have heard it?

A Yes, they could.

[65] Q And it had an earphone attached to it to go to the ear?

A Yes, it did.

Q Now, who was it that dropped this stuff? Who was it?

A It was Lonnie Joe Carter.

Q Do you know Lonnie Joe Carter?

A Yes, I do.

Q Is he here in the courtroom?

A Yes, he is.

Q Where is Lonnie Joe Carter?

A (Pointing to defendant seated at counsel table with his counsel) He's sitting right there.

Q And he's the man that stopped at Third Street when you yelled the last time?

A Well, on Virginia Street.

Q On Virginia Street and Third?

A Yes, there in front of the church.

Q I would like to show you this item right here, Mr. Davis, and ask you if you can identify it (handing item to witness)?

A (Looking at item) This is one of the items that he dropped that he had in his hand.

Q This is one of the items that Lonnie Joe Carter dropped?

[66] A Yes, he did.

Q While you were in pursuit of him?

A Yes, sir.

Q At 2:00 a.m. on this morning?

A That's right.

Q I would like you to examine this and see if you can identify it (handing an object to witness).

A (Looking at object) Yes, this is the radio. This was out where you put the earphone.

Q (Pointing to radio) This opens here, does it?

A Yes, it does.

Q And is this the earphone you are referring to?

A (Looking at same) Yes, sir.

Q And this was set on police band?

A Yes, it was.

Q To pick up police calls, is that correct?

A Yes.

Q And this is the other item that Mr. Carter dropped in the church yard?

A Yes, it is.

HON. GRADY RUFF: I would like to introduce both of these into evidence, please.

THE COURT: [67] Let them be received into evidence and so marked.

(BAG AND RADIO FILED HEREWITH AS COMMONWEALTH'S EXHIBIT 16 and 17).

Q Do you recall whether or not Lonnie Joe Carter had on an outer coat that night when you arrested him?

A No, he didn't.

Q He did not have one on?

A No, he did not.

Q What did he have on?

A He had on a shirt and a pair of pants.

Q Did he have anything on his hands?

A No, I don't think so but I can't remember. I remember he had some gloves in his back pocket.

Q He had some gloves in his back pocket?

A Right.

Q Did you give Lonnie Joe Carter his rights under the Miranda Act or did someone do it?

A It was given to him at the station.

Q Did he make any statement at that time?

A No, he didn't. After we give him his rights we asked him some questions but he really wasn't doing too much talking.

Q Were you present when a conversation occurred [68] between. . .

OBJECTION BY HON. W. E. ROGERS, III: Judge, I object to him leading the witness.

THE COURT: I will OVERRULE THE OBJECTION. Go ahead.

Q Were you present when a conversation occurred between Major Colon and Lonnie Carter in regard to the ownership of those two jackets there in front of you?

A Yes, I was.

Q Do you recall what was said?

A Major Colon asked him did he want to take the whole crime on hisself and I had asked him myself who was the other guy that the other jacket belonged to and he said: "There was no other guy. Both of these jackets belonged to me."

Q Now you heard him say that yourself?

A Yes, sir.

Q He admitted that both—or stated rather that both jackets belonged to him?

A Right.

HON. GRADY RUFF: That's all. You may ask.

[69] CROSS EXAMINATION

QUESTIONS BY HON. W. E. ROGERS, III:

Q Officer Davis, do you remember where you were when you got the call from Officer Ellison?

A I was sitting right at the corner of Fifth and Virginia.

Q Do you remember why you were there? Were you rolling at the time?

A No, I was sitting there.

Q Were you parked along the side of the street or...

A No, sir, o.k., I was working the east side that night and I was down in that area, patrolling the downtown area and so I pulled up to the corner.

Q Was your car along the curb?

A In the traffic lane.

Q In the traffic lane?

A Right.

Q Why were you stopped?

A Because there is a stop sign there and I was observing the people that were standing over to my left in front of one of the clubs.

Q Now, wait a minute, you said there was a stop sign. Were you on Virginia Street or were you [70] on Fifth?

A I was on Fifth.

Q You were coming down Fifth?

A Right, towards Main.

Q You stopped then at that stop sign on Fifth Street?

A Fifth and Virginia, right.

Q And you were talking to some people that were at that club on the left?

A I wasn't talking to anyone, no, sir. I was looking at some people.

Q And when did you get the call from Officer Ellison?

A Well, see, when we are riding around in those cars we pay attention to anything that is going on and when we go out we can still hear over the radio and when she said there was two black males running down the alley behind Young Hardware I just looked straight towards that alley and I seen them come out.

Q You saw two men coming out, is that right?

A Right.

Q And what—were you able to tell what both men were wearing?

A Well, they was running pretty fast. I noticed [71] the short subject and he had on either a gray or white sweat shirt and it had cut off sleeves on it because the taller subject was in front of him. He was in the lead when they was running and when they was running between the cars I cou. ln't see too much but I could see where they was going and the other subject doved back when I pulled out and was headed in the same direction they was running.

Q The other man, you say, doubled back toward the bars on Virginia Street, right?

A Right.

Q And you continued on and followed the other suspect, is that right?

A Right.

Q Did you ever lose sight of that suspect?

A Well, between in the direction he was running in that parking lot he would have to pass Mason-Pontiac office and that building was in between me and him and that was the only time I lost sight of him to the time he went down that alley.

Q You didn't lose sight of him when he was running between cars in the Mason-Pontiac lot?

A Well, trying to watch him and where I was [72] going too as fast as he was running he couldn't have slowed down at no time.

Q Now, did you get that radio running (referring to Commonwealth's Exhibit 16)? Does it work?

A When we got to the station I think Major Colon found it was set on the police band and we got it as evidence and we were filling out paper work also.

Q Does that radio have batteries in it?

A Yes, it has.

Q Will that radio play now?

A I couldn't tell you. It also has an electric plug on it and probably if it was plugged in it would work but

it has been handled quite a bit since all of this has been going on.

Q Well, do you think you know how to work the radio?

A I guess so.

Q Would you see if you could get it to work, please, sir, (handing same to witness)?

A (Taking radio and trying to operate same) It doesn't seem to be working now.

Q Did you try it out on the night of this incident?

A No, I didn't.

[73] Q Do you know whether or not anybody did try?

A I think Major Colon did.

Q You mentioned that you saw some gloves in Lonnie Joe Carter's back pocket, did you take those gloves from him?

A No, I didn't.

Q Can you describe the gloves?

A I think they were black gloves. Like I told you, there was lots of people going from office to office plus I had to go back to the scene to help gather evidence.

Q Are you sure he had gloves in his back pocket?

A As far as I know, he did.

Q As far as you know. Are you sure?

A I couldn't be positive.

Q If he had had gloves in his back pocket and you knew he was a suspected burglar would you have taken those gloves from him as evidence?

A Like I said, when we got down to the station I brought the radio in and also that bag and the other things he had on his person I think was taken by someone else.

Q Well, do you know if anybody else has got any gloves that belonged to Lonnie Carter?

A The gloves that was found on him they was sent [74] to the lab to get dust sample along with some dust sample from the hole knocked in the wall.

Q Where are those gloves now?

A They are still at the lab for they are months behind all over the State of Kentucky. They are behind and we haven't heard anything from them.

Q Does the prosecutor know about this?

A Yes, he does.

Q Now, you say that when you went to the police station that you or somebody read Mr. Carter his Miranda Rights, is that right?

A Yes, sir.

Q And you said that he said to Mr. Colon those coats—both of those coats belong to me?

A Yes, he did.

Q Did you believe that?

A No, I didn't believe it.

Q Are you sure he may have said or could have said that neither of those coats belong to me?

A No, sir, he did not say that because when I asked him who does this other coat belong to he said: "It didn't belong to anyone. It belongs to me—both of them belong to me"—and he said there was no other guy. [75] Q Well, did he tell you that he had broken into Young Hardware?

A No, he didn't. When we asked him about the coats right here (pointing to jackets in front of witness stand), shortly after that he would not say anything else.

Q Are you sure he didn't say: "I don't know anything about another guy?"

A All he said to me was that there was no other guy.

Q Can you describe to me what this other guy looked like?

A Well, he appeared to me to be about 5'9" or 5'8", stocky built and a little bit heavier than me. He was dark skinned, I know that.

Q Did you ever go back up to the bars on Virginia Street looking for this other man?

A No, I didn't because I am quite sure from experience that he wouldn't have stayed down there once the police got out of his eye sight.

Q Did you ask anybody around the bar if they had seen somebody running back up that way?

A It wouldn't do any good.

Q Why not?

A Because they wouldn't tell you.

[76] Q So you didn't make any further search for the other man?

A No, sir, and, like I said, I was gathering evidence and filling out a lot of paper work.

Q Do you know what other items that were outside that store in the alley besides these items that have been admitted into evidence, this strap and box? Were there other things out in the alley?

A As far as I know they are some of the things that were taken off that shelf outside that hole.

Q Do you know whether any of these items have been sent off to the lab for testing?

A No, I don't. We have a list but I don't think any of those items are on there. We only sent dirt samples and clothing and gloves.

HON. W. E. ROGERS, III: That's all.

HON. GRADY RUFF: Judge, I have a few more questions.

[77] RE-DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q Officer Davis, how long has that radio over there been down at the police station?

A Ever since the night it happened.

Q Some five or six months ago?

A Right.

Q You say you don't remember—that you didn't try the radio but you think somebody else did and that it worked?

A Yes, sir.

Q Is is possible that the batteries have run down in six months time?

A Could be and it has been setting up in a dry place.

HON. GRADY RUFF: That's all.

THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS DISMISSED AND WITHDREW.

HON. W. E. ROGERS, III: Judge, may I approach the bench?

THE COURT: Yes, sir.

* * * *

[86] RUSTY COLON

Having been first duly sworn, testified as follow:

DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q State your name to the jury, please.

A Rusty A. Colon.

Q Where do you work, Mr. Colon?

A Hopkinsville Police Department.

Q How long have you been there?

A Eleven years.

Q What is your present rank?

A Shift Commander, Major.

Q Were you on duty on the night of December 22, 1978?

A Yes, sir.

Q And were you involved in any way with the investigation of the break-in at Young Hardware?

A Yes, sir.

Q Major Colon, I want to ask you: Did you have any conversation that night with Lonnie Joe Carter?

A Yes, sir.

Q You know Mr. Carter, do you not?

[87] A Yes, sir.

Q Is that him seated there (indicating defendant seated at counsel table with his counsel)?

A Yes, sir.

Q Do you remember what it was about?

A Yes, sir, it was basically about a crime that had been committed at Young Hardware.

Q Do you recall how the conversation went; what you might have said to him? I am especially interested in any conversation, if you had any, concerning those two jackets there (indicating Commonwealth's Exhibits 3 and 4).

A They—by "they," the other officers had already brought Mr. Carter to the police department and they were in the investigator's office in the back part of the building and I had gone in and they were talking with him at the time and there was a second individual that had managed to escape, that was close to the scene at the time that they thought was involved in it and they were never able to apprehend him as he fled off and they had these two jackets and when I talked to Mr. Carter for a few minutes in reference to the crime I asked him if he intended to go it all by himself and [88] take the rap alone or if he wanted to implicate the other individual and he said that there was none other than himself and I made reference to both of these jackets and he said that both of the jackets were his.

Q That they both belonged to him?

A Yes, sir.

Q Now, the other area I want to talk to you about is a radio. Did you see a radio, a portable radio that night at the investigation or down at the office anywhere?

A Yes, sir.

Q Did you examine the radio at the time?

A Yes, sir, I looked at it and it was a multiband radio.

Q Did you pay any attention as to what band it might be set on?

A It was set on police frequency and it appeared to be on our frequency and I attempted to get the radio into operation and I couldn't get it to operate at all and one of the other officers took the radio and fiddled with the batteries and it finally did come on.

Q Was it connected up to your police radio?

A Yes, sir, it was set to our primary frequency.

[89] Q And it would pick up calls from your station to the cars, is that correct?

A Yes, sir.

HON. GRADY RUFF: I have no further questions.

CROSS EXAMINATION

QUESTIONS BY HON. W. E. ROGERS, III:

Q Officer Colon, did you go to the Young Hardware Store that night?

A Yes, sir, I did.

Q Did you assist in picking up the items that were out in the alley?

A No, sir, I don't believe I secured any of the items that were out there.

Q As Major, that means that you are in charge of the whole operation during the time when you are on, is that right?

A I am in charge of the patrol section, yes, sir.

Q Are you also in charge in investigation?

A No, sir.

[90] Q Were there investigators at Young Hardware?

A I don't recall whether there were any investigators on the scene at the time I was there or not. I really couldn't advise on that.

Q Do you know whether any investigators ever went to Young Hardware?

A No, sir, I don't.

Q You don't know whether they did?

A I couldn't positively say for sure.

Q I want to show you these items that have been placed in evidence. This is a strap and this is a box of hinge straps (referring to Commonwealth Exhibits 1 and 2). Were there other items out in the alley when you got there?

A Yes, sir, there very well could have been for there were bricks and debris and things they had removed from the wall and the hinge straps, it seems like there was more than one box of them that were removed from the building. I don't recall if there was anything else outside of the building or not. We looked for some type of a tool and I don't recall ever finding one where the blocks were removed—used to remove the blocks with.

Q Do you know whether or not your men or the [91] investigators took any fingerprints of any of these items?

A If there were any fingerprints removed it would have been done by the investigators.

Q Did you take Mr. Carter down to the station with you?

A No, sir.

Q You were there when he was brought in or did you come in later?

A He had already been removed from the scene when I—I believe he had already been removed when I first seen him. He was already in the police department.

Q Was he under interrogation when you came in?

A When I first seen him I don't think anybody was talking to him. There was another officer in the room with him but I don't believe he was being interrogated.

Q Well, did you read him his Miranda Rights or. . .

A His rights had already been given him by the officer. He had been warned of his rights under the Miranda.

Q So he had been questioned before you got there?

A I presume he could have been but I don't know.

[92] Q Do you remember anything being said about a cigarette?

A About what?

Q About a cigarette—do you remember any conversation about a cigarette?

A No, sir.

Q Was there a package of Salem in that bag there that is on the floor?

A I don't recall.

Q You don't recall a conversation about cigarettes then?

A No, sir, I do not.

Q Now when Lonnie told you that both of those coats belonged to him did you believe him?

A I really couldn't say whether they were both his or not. I presume if he wanted them both to be his they could have been.

Q Did you ask him to try them on?

A No, sir.

Q Did you get that statement in writing?

A I didn't.

Q Did any of the other officers get that statement in writing?

A The investigators may have. I really don't know.

[93] Q You didn't get any type of written statement from Mr. Carter, did you?

A No, sir, I did not.

Q Did you ask him—when he told you that both of those coats are mine—did you ask him to put that in writing?

A I don't recall asking him to put it in writing.

Q Didn't you think it was important enough to be put in writing?

A No, sir, apparently not or I would have asked for it. As I recall, there was myself and two and possibly three other officers in there then.

Q Are you saying that this was more or less a meaningless statement that he made to you?

A It was to me, yes, sir.

HON. W. E. ROGERS, III: I have no further questions.

THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS DISMISSED AND WITHDREW.

HON. GRADY RUFF: Your Honor, that's the Commonwealth's case.

THE COURT: Ladies and Gentlemen, we have been here for [94] a while so let's have about a 10 minute break and I would like to see counsel and the court reporter back in my office but Ladies and Gentlemen before we take the break I want to remind you again not to discuss this case with anyone or among yourselves at this time or allow anyone to contact you regarding this case. Reserve your judgment in this case until you have heard all of the evidence, the Court's instructions, argument of counsel and the case is finally submitted to you.

With that admonition we will take about a 10 minute recess.

HEARING IN CHAMBERS

THE COURT: Mrs. Scruggs, let the record show that we are now in the Court's chambers with counsel for both sides, defendant and court reporter. All right, gentlemen.

HON. W. E. ROGERS, III: Judge, I would like to make a motion for a directed verdict and also I would like to renew my motion for a mistrial on the basis [95] of the Commonwealth's failure to respond to the motion for Bill of Particulars.

THE COURT: The Court has already passed on the question concerning the Bill of Particulars. I don't look upon that as prejudicial to the defendant's rights under Criminal Rules 9.24 and 9.26 which deal with two subjects, harmless error and substantial error. I simply

cannot see where his substantial rights have been affected even if you should have been furnished the information that you have mentioned, about the gloves, I believe?

HON. W. E. ROGERS, III: Yes, sir.

THE COURT: So on the basis of those two rules I OVERRULE THAT MOTION.

As to the motion for a directed verdict, true enough the evidence in this case is circumstantial but I think they have made out enough case to take the case to the jury under the most recent case that I know of, Houston vs Commonwealth, 554 SW 2d, page 89. And, in substance, the Court there held that the test [96] of whether or not evidence is circumstantial is not whether the evidence is consistent with innocence as it is with guilt, that used to be the rule, but the present rule is if the evidence is such that the Trial Judge can conclude that reasonable minds might fairly find the defendant guilty beyond a reasonable doubt it is sufficient though circumstantial. I suppose that is another way of saying the same thing but in any event I will have to deny the motion for a directed verdict.

Now, Mr. Rogers, assuming that is the only motion you have at the present. . .

HON. W. E. ROGERS, III: Yes, sir.

THE COURT: We must now approach the question and if you want a minute or two to talk to your client as to whether he is going to elect to take the stand, you can do so, or if you have made that decision, we will go on to the question of the impeachment because understand that the Commonwealth has some cases it wants to submit to the Court under the Cotton case.

HON. W. E. ROGERS, III: [97] Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses that he is aware of and has told me about. I would like to explain to him in front of you what this all means.

THE COURT: All right.

HON. W. E. ROGERS, III: Lonnie. . .

THE COURT: Now, Lonnie, I want you to fully understand what we are talking about.

HON. W. E. ROGERS, III: Lonnie, if you take the stand and, of course, you will be under oath and you will swear to tell the truth, but the Commonwealth can use the fact that you have several offenses on your record that involve theft and impeach—you know what I mean by "impeach"?

LONNIE JOE CARTER: Nodded that he did.

HON. W. E. ROGERS, III: They can impeach your capacity or your propensity to tell the truth and this, I might tell you, in my experience, is a heavy thing; it is [98] very serious, and I think juries take it very seriously and your propensity to tell the truth is weighed down I think quite heavily by the jury. I think, Judge, there are one or two storehouse breaking charges, one is third degree burglary and another theft of over $100. on his record.

THE COURT: Well, the two that are alleged in the second stage, should they find him guilty, the storehouse breaking in 1973, and the knowingly receiving of property of over $100.

THE COURT TO HON. GRADY RUFF: Are those the two?

HON. GRADY RUFF: Yes, sir. That's two of the ones that I want to bring out.

THE COURT: I am not going to let you just sift through his entire record.

HON. GRADY RUFF: Judge, I think that. . .

THE COURT: The Court can limit that.

HON. GRADY RUFF: [99] In this case I don't think you should because there's a steady stream of them.

THE COURT: Well, you know what the Cotton case says as well as I do. The Court has discretionary control in several respects and, of course, one of them is

the age of the conviction, how remote it is, and naturally, it must involve dishonesty and the Court has control over the number of other convictions that I can allow you to introduce for you to get to the point—if the man has a dozen that would be taking it to the extreme and I simply wouldn't allow you to introduce a dozen charges.

HON. GRADY RUFF: Judge, I don't have a dozen. I don't have but eleven.

HON. W. E. ROGERS, III: Judge, I agree with you on that point.

HON. GRADY RUFF: Of course you would because they would tend to be inflammatory.

THE COURT: Really, of course, the choice is yours which ones you use.

[100] HON. GRADY RUFF: Well, we have some extremely recent ones. Lonnie Joe, you wrote to me from the federal penitentiary at some time. What were you in there for?

LONNIE JOE CARTER—DEFENDANT: I have never been in the federal penitentiary.

HON. GRADY RUFF: What place was that you were in up argound. . .

LONNIE JOE CARTER: Henderson.

HON. GRADY RUFF: No, I thought you were up in West Virginia.

LONNIE JOE CARTER: No, I never been in federal penitentiary.

THE COURT: You have never had a federal offense?

LONNIE JOE CARTER: I had a federal offense but never was in West Virginia.

HON. GRADY RUFF: Where did you do the time?

LONNIE JOE CARTER: Up at Henderson, Kentucky, Green Hill Comprehensive Center.

[101] HON. GRADY RUFF: When was that?

LONNIE JOE CARTER: Just last year.

THE COURT: That's not a penitentiary?

LONNIE JOE CARTER: What it was I was paroled and they let me out down at Eddyville and the fed

failed to pick me up at that time and I was on the street about three weeks and they exercised the detainer and I had about four months to do and they sent me up to Henderson.

THE COURT: That would have to be off your list. That was a detainer. So that leaves you ten.

HON. GRADY RUFF: And they are all good ones too, Judge. I don't know how many he has got.

THE COURT: What are they? You mean qualified under the Cotton case?

HON. GRADY RUFF: Yes, sir, eight storehouse breakings, one grand larceny, one operating a motor vehicle without [102] the owner's consent and knowingly receiving stolen property.

HON. W. E. ROGERS, III: Those storehouse breakings go back to the early 60's.

HON. GRADY RUFF: They go back to the time he was eighteen (18) and about a week after he became eighteen (18) he started showing up in the big court.

THE COURT: I think anything about that early I rule out of the ground of remoteness.

Grady, I don't think it is safe for I think you are inviting a reversal on the inflammatory ground if you get above three and I think three would be the limit that I would let you go and I would suggest that you pick out the most recent ones and if you could avoid the two that are involved in the second stage you would probably be better off.

HON. GRADY RUFF: I can't do that for those are the two most recent one so that's the way it has to be.

THE COURT: Well, there's no rule that I know of that [103] prohibits using those. It seems a little bit strange that they split the trial and made two stages of it with two aggravating or enhancing convictions or whatever you want to call them.

HON. GRADY RUFF: Well, it wouldn't necessarily always be that way. In fact, he could have two that

weren't even of the Cotton variety so we couldn't even bring them up.

THE COURT: That's true. Now, before we get into the matter we need to have an indication from Lonnie and his lawyer and if you all want to go out and talk about it you can do it, of whether or not he wants to testify. Lonnie, do you understand what we are saying? You have got a choice of not testifying and he cannot mention that fact. He cannot argue the fact that you didn't testify. He can't argue that to the jury. You can sit there and say nothing and it cannot be mentioned if you don't testify but if you do these other convictions can be shown to indicate to the jury that maybe you are not telling the truth.

LONNIE JOE CARTER: [104] Are you saying the most recent convictions?

THE COURT: Well, they are the ones he plans to use. Now, do you understand what you are charged with?

LONNIE JOE CARTER: Yes, sir.

THE COURT: All right, you talk to Mr. Rogers and then tell us what you want to do.

WHEREUPON, at this time Mr. Rogers and the defendant left the Court's chambers and had a discussion as to whether or not the defendant would testify, after which the defendant and his lawyer returned to the Court's chambers.

THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers and you have told me you have decided not to take the stand?

LONNIE JOE CARTER: Yes, sir.

THE COURT: Mr. Ruff knows this and he knows that he [105] cannot comment upon it in his closing argument so we avoid the necessity of getting into the Cotton case question. .

HON. W. E. ROGERS, III: Judge, I would like to add into the record that the advice of counsel to Mr. Carter was that in plain terms he was between a rock and a hard place and that if he testified that his prior

convictions could be used to impeach his testimony and if he didn't testify the jury whether Mr. Ruff comments on it or not would probably use that against him. And the decision not to testify was made by Mr. Carter himself.

THE COURT: Excuse me, did you say you advised him to testify.

HON. W. E. ROGERS, III No, I didn't. I told him that it was a double edged sword and that if he testified that the previous offenses would be used against him and that if he did not testify that the jury, in my experience, would use that against him by him not testifying and so it had to be his decision. It couldn't be mine.

[106] THE COURT: Do you fully understand that, Lonnie?

LONNIE JOE CARTER: Yes, sir.

THE COURT: Now, if you have bad luck and get convicted I don't want you to get up there and say that you weren't told all of this. It is on the record.

LONNIE JOE CARTER: Yes, sir.

THE COURT TO HON. W. E. ROGERS, III: Do you have any evidence for the defense?

HON. W. E. ROGERS, III: No, sir.

HON. DAN KEMP: Then we can now discuss the instructions.

HON. W. E. ROGERS, III: I make an oral request for an instruction on trespassing.

THE COURT: Well, . . .

HON. W. E. ROGERS, III: I think this case from the proof that has been presented lends itself more to a charge of [107] trespassing than to a burglary charge.

THE COURT: No, Petey, I can't agree with that. It is either a case of being guilty of the charge or innocent of it. If he were to take the stand from what has been said—of course, I can't base my ruling on this, but should he testify I understand that Lonnie Joe would simply deny that he was anywhere around or had anything to do with it. From what I—he has not said that to me but

from what I hear that is his attitude and in face of that, that is a plain denial and alibi, or whatever you want to call it, and I don't see—there's no proof to instruct trespass on. Now, had he been drunk, for instance, and said so and got in there and didn't know where he was or something of that kind you have got trespass but in the absence of something like that I think he either had to stand or fall on the charge.

But you have got that in the record.

HON. W. E. ROGERS, III: Thank you, Judge.

WHEREUPON, instructions having been prepared the Court, counsel for both sides, defendant, Lonnie Joe [108] Carter, and the reporter returned into open court and at this time Hon. W. E. Rogers, III advised the Court that there would be no testimony introduced for and on behalf of the defense.

THE COURT: Ladies and Gentlemen, the case now having been completed I will now read you the Court's instructions which is the law in this case which will govern you when you go to the jury room to decide it. Whereupon, having read his instructions the Court advised counsel for defense that he might make his closing argument.

CLOSING ARGUMENT TO THE JURY

BY HON. W. E. ROGERS, III:

Ladies and Gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The Judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. He doesn't have to do [109] anything. We believe that this case just hasn't been proven. This is a case of breaking into Young Hardware and called third degree burglary under

our law and it requires that you go into the building with the intent to rob or to commit some other crime. The prosecution has to prove not only that this is done, but that this man (indicating the defendant seated at defense table) did it. Now, God only knows that they proved that this place was broken into. We will certainly admit that. But they have not proved beyond a reasonable doubt that this man (again indicating defendant) did it.

Let's look at their testimony in that regard. Let's look at Officer Ellison's testimony. She was the lady officer. Her testimony was used to identify the subject. In your mind, did she identify Mr. Carter? She said that in a flash—it was pitch dark, 2:00 o'clock in the morning; there were no lights in this alley and she turns on her spotlight and in maneuvering her car around she couldn't even remember whether she backed it up or not but you go over there and look and I will guarantee you that from where she was sitting she had to back that car up—either that or she's a plastic man. In that flash, in that instant, she turned that spotlight on and she looked down there and she saw some figures yes; she saw some figures. I don't doubt her there. I don't doubt her testimony in any respect but I [110] do doubt what she saw. She said she saw one man who had on brownish color pants and another man that was tall and slim and another man that was short and chunky. She didn't know what color pants he had on but they were dark. She evidently radioed the description to the other officer. She merely saw two images in the dark as if you were to take a strong flashlight and shine it down a dark alley. You could see two images and in all of the confusion remember what they had on and remember what they looked like? Now, she didn't remember that. She saw this man (again indicating defendant) at the police station or later when he was brought up to the scene of the crime. Then she saw him. And she said: "Yeah, that's the man", and that's when she knew what color pants he had on. I will

bet you if she had been asked before he came up there what color pants did that man have on she wouldn't have had any dreaming idea.

Now, the prosecution has got to show that this (again indicating and pointing to defendant) is their man. They have got to show that this is the man that broke into that place. They have shown this is the man that was running—this was the man that was running down the street and he saw the police—it was 2:00 o'clock at night—and he took off running. Now, that in itself is an inference but it does not mean that he is the man that broke into this place. And that's all they have. They have him running down [111] the street with a bag in his hand and with a radio in his hand, neither of which were identified as having been at the scene. This lady said that she saw a man running with a bag. Well, what does that mean? It didn't have any burglary tools in it. Running down the street with a radio; so it is on a police band or hooked up listening to the police, what does that mean? That doesn't mean anything more than running down the street with a bag in his hand. That doesn't mean that he broke into Young Hardware. He may have been just walking down that alley. He could have been just walking down that alley with a bag in his hand and the police come up and he takes off running. That's all they have proved. If you want to send this man to prison for that then, you know, think about it, because one of these days you may have a child or it might be you that is going to prison if you happen to be somewhere at the wrong time.

Now, I want to tell you something. The police and the prosecution and the state are not helpless. Now, this man (again pointing to defendant) is helpless. He has been in jail five (5) months while they have had the laboratories and the investigators and that's good; I am glad that we have that. We pay for it with our tax money and I am glad that we have got it but five (5) months, they say, to get back from the lab some gloves and to test the dust on them, where is that testimony? Where is

that? The [112] officer said it was up in Frankfort. He said that the prosecutor knew about it. The prosecutor could have asked for a continuance in this case. I am not the one that was begging to try this case today. The prosecutor could have asked for the evidence to come down to prove that was the same dust. Where is it? They have got these labs. They have got to use them. You have to make them use them. And if you don't make them use them, then they just bring people in here and railroad them. Where are the fingerprints? They picked up things here (indicating hinges, etc. and picking one up) that would carry fingerprints. I don't know much about fingerprints. I have seen television like you all have. I have seen them go around and dust things to pick up fingerprints, but they didn't even try. They just knew they had a guy running and when a guy runs he is guilty, right? Even though he is over there near black town and even though the officer himself is scared to go over there and says that if he goes over there nobody is going to say anything to him or tell him about anything; everybody over there is scared to death at 2:00 o'clock in the morning of the police. I bet you those police could have looked at anybody over there on that street cross-eyed and they would start running and they they go pick them up for doing whatever they wanted to say that they were doing and then bring them into court and not prove it and put them [113] in the penitentiary—put them away—isolate them on nothing.

I know that Mr. Ruff is going to make a big point of this running and I want you to remember what he could have proved.

You know I don't know what happened out there that night. Lonnie Carter says that he is innocent. That is what he says when he says that I am not guilty and he doesn't have to get on that stand to say it. "I didn't do it", he says, by saying that he is not guilty. We haven't said that Mack Arthur didn't get broken into. Mack Arthur got broken into but somebody else did it and there was time for somebody else to have done it.

It must have taken quite a long time to break through three layers of brick. There could have been almost innumerable numbers of people that could have done this and the police want to hang somebody that was running.

Ladies and Gentlemen, I ask you to remember that our obligation as citizens and as jurors—this is a very special spot that you are sitting in here today—this is where justice really comes out and I really thank goodness for our system that says we are not guilty until we are proven guilty and you remember that a man is not proven guilty by a great oratory and I am the first that will sit there being spellbound by Mr. Ruff. Don't hold it against [114] Lonnie Joe Carter, because Grady Ruff can talk better than I can. Don't hold that against him. And remember that it was the prosecutor's job to prove this man guilty beyond a reasonable doubt and that he is innocent until that is done.

Thank you.

THE COURT: All right, Mr. Ruff.

## CLOSING ARGUMENT TO THE JURY

## BY HON. GRADY RUFF:

HON. GRADY RUFF: May it please the Court.

THE COURT: Mr. Ruff.

HON. GRADY RUFF: Mr. Rogers.

Ladies and Gentlemen, I want to briefly go over the evidence that we were privileged to hear in here today and I would say, as Mr. Rogers has said before, [115] consider the whole case. Consider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened or what. Base your judgment on the evidence. That is where your judgment and decision could come from is the evidence.

Now, I hope everyone understands this little sketch here (referring to drawing on blackboard). (Pointing to

sketch) Actually, this is as if you were standing in front of Young Hardware which is right down the street here, as you know. (Pointing to sketch) This is Young Hardware; this being Main Street out here and this is Virginia and right next to this, this little building here would be Edna's Used Furniture. Now Officer Ellison testified that just before 2:00 a.m. on a very cold night in December that she turned off of Main and came down Sixth Street and as she passed this alley she noticed that something was in there that usually was not. She testified that she stopped and backed up and threw her light into the alley and that she threw it right on two black males who were squatted down in the alley. She told you that they immediately stood up and ran. They turned and ran down this alley. Now when you come out of this alley, as she told you, there's a way that you can cut back over this way, and then this is an opened area and she says that she went down the alley in her car and saw one of them, the tall thin one with the orange color pants on [116] cross Fifth Street here and jumped a chain that Mason-Pontiac has right here along Fifth Street along the sidewalk, if any of you are familiar with it. She said that when she turned down here she immediately called for LeRoy Davis to help her, to come, and what had happened, that there were males running, two black males running, and Mr. Davis, as good fortune for the citizens would have it, was sitting right here. He testified that he was on Fifth Street headed in this direction (again pointing to sketch on blackboard) when he saw them run across here. He told you that he turned and drove parallel with the way that they were running. That one of the subjects, as they call them, the short chunky one, turned and came back—in fact, that is Mr. Davis' mark (pointing to sketch) that he headed back in this direction and that the tall thin one ran on toward Fourth. Now, remember this is a very short distance. It is not any distance, a very short block here, and Mr. Davis is in an automobile

driving parallel to it. When he pulls down here to Fourth he sees the same man run across Fourth Street into an alley that runs between buildings here (pointing out same on sketch). There's a fish market or something here and then maybe a lumber yard and then over on this —there's a car lot and possibly a motel or something, but anyway there's an alley that runs completely through there and Mr. Davis testified that he saw the man. He first saw him run [117] out of here (again pointing to sketch) and across here and up that alley. He saw him enter that alley. He told you that he drove up here and went to that alley and got there just in time to see this man (pointing to defendant) run out of there. And he told you that he yelled at this man to stop and he did not. He told you that the man turned and ran across this church lot there—there's a small grassy lot—at which time this man (again pointing to defendant), Lonnie Joe Carter threw this bag (picking up Commonwealth's exhibit, the bag) and this radio (picking up Commonwealth's exhibit, the radio) down. He threw them down in this lot and continued to run. Now Davis bailed out of his car and chased him on foot and he told you that when Lonnie Joe turned this corner that he nearly fell down and he yelled at him again and that he stopped and he put him under arrest. Now, that's a portion of three or four blocks there—well, actually, one, two, and a portion of this one (pointing to sketch on blackboard) and it took only seconds. They say two minutes and I would guess that a man running could do that in one minute. And they further testified that when they brought them back Miss Ellison, Policeman Ellison, said that the clothes matched the ones that one of the men, the tall thin one had on. And she further testified to you here, she described his build and told you the race he was; that he was thin and tall and she described his clothing and [118] he looked like he had some sort of bag in his hand. Now, that is the Commonwealth's case, in effect, that someone knocked a hole

in this wall here at Young Hardware at 2:00 a.m. in the morning and pulled items out, and you have seen some of them they picked up, and left them in that alley and Mr. Arthur has testified that he did not give anybody permission to do that; that he didn't want anybody knocking a hole in his building.

Now, within a minute, possibly, this man is caught right here (pointing to sketch). He is seen running from that hole, not just near the hole, not in the area, not on the street adjacent to it, but kneeling down—squatting down by that hole, the very hole that has been knocked into Mr. Arthur's business. He immediately jumps up and runs and is watched and Miss Ellison told you she saw him cross Fifth and jump the chain. And here at the same time is LeRoy Davis. He sees him cross Fifth. LeRoy turns and follows him. Now he lost sight of him, true, behind Mason-Pontiac but lo and behold when he gets here (pointing to sketch) there he runs again. He goes on up here and turns down the alley and here's this man (pointing to defendant), this fellow running out the same end of the alley and he is carrying a bag and a radio and the radio by a strange coincidence was one that would pick up police calls and, further, has an ear plug in it. Do you know what an ear plug does to a [119] radio? It keeps it from playing loud. You can't hear one except through the plug. Now that is a commonly used burglar's tool. They have it set on the police frequency and if someone in the neighborhood were to call the police department and say: "Listen, I think I hear someone knocking a hole in Young Hardware" and the police department put it out on the radio would car so and so go by Young Hardware by the time they got there this fellow would have been gone because he is listening in to the same frequency. He hears it just as well as the car and it is a commonly used burglar's tool.

Now, what other proof did we have? Mr. Colon, Major Colon says that he is the one that noticed it was on the

police band and Major Colon said that someone down there got it to work that night and that it was working at that time. Of course, it does not work now. It has been five or six months with the batteries running down in there, but at the time it did work and the other thing that Colon knows is that he asked Lonnie Joe to tell on who it was with him. That's the significance of this. He said: "Now, look, you are not going to take all of this by yourself. Tell us who that other guy was." And Lonnie Joe says "no", there was no other guy. And he says: "Well, why are there two jackets there?" And Lonnie Joe says: "They both belong to me." Now that is not controverted whatsoever. It is not controverted that Lonnie Joe is the man that Miss Ellison saw here. [120] It is not controverted that Lonnie Joe is the man that Davis caught up here (again pointing to blackboard sketch). It is not controverted that Lonnie Joe had that bag (pointing to bag on reporter's desk) and that radio (pointing to radio) with him. It is not controverted that both of those jackets belong to Lonnie Joe. At least, that is what he told the police department. But, at any rate, that is all we have to go on because he told the police department that both of them belonged to him.

Sometimes juries get the idea that the only way that you can convict in a case like this is if you have a moving picture of Lonnie Joe Carter knocking the hole in there and reaching in, but that is not true. Circumstantial evidence lots of times is even stronger than even an eyewitness. Now, let's look at this. It is true that this is circumstantial evidence but it is sort of like finding someone with jam all over his face among other things. You have got an idea. You didn't see them but you know they have got jam all over their face and the chances are they did. Now, that is circumstantial. Tracks across the sand—you didn't see the man go but there are the bare footprints in the sand. That's circumstantial but someone crossed there and you can say as a certainty that they did. If Lonnie Joe didn't do this, what were

his jackets doing in that alley? The police say that he probably took them off while he was [121] breaking in there and there is nothing else in the record for you to find otherwise. Why did he run away, when they flashed the light down there? It could been that it was his supper time but that's not in the record. The police believe he did it because he did not want to get caught breaking in there. What was he doing in the alley anyway at 2:00 a.m. in the morning? What was he doing up there if he wasn't breaking in that building? What was he doing with an empty bag like this (picking up Commonwealth's exhibit, the bag)? What purpose would a man have in an alley at 2:00 a.m. with a bag like that and what purpose would he have with a radio that picks up police calls? Has that been explained to you? If it wasn't—if this bag wasn't to carry off the loot in and the radio wasn't to listen for police calls, what were they for? The police tell you that is what they believe it was for. And you have nothing else to go on. Why is there an ear plug in that radio? To make it play softly so that it cannot be heard from the street; that the man wearing the ear plug can hear the police and no one else would know the radio is on.

Another thing, why didn't Lonnie Joe stop? If he is not guilty and if hadn't been down to that scene why did he not stop when he nearly ran over the police car here when Mr. Davis yelled to him to stop? Why did he keep running? Why did he throw that bag and that radio away? Can [122] that be answered? It looks like a good bag and it looks like a good radio. It is a good radio for picking up police calls. Why throw that away?

You, the jury, has every right to use your common sense when you go back there in the room to decide these cases. I think everyone of you know exactly what all of these pieces of evidence point to, the jackets, and the radio, the running, the time. Now we say and the police department says there could be no other reasonable

explanation for a man running away from a hole in a wall at that time of morning and leaving his jackets by the hole and throwing away his police radio and his bag to carry the loot in and not stopping when the police department asked him to; there could be no other explanation but that he is running from that break-in which he did. Now, you can draw that conclusion. It's a reasonable conclusion. And it is the only conclusion that you can draw from the evidence that you have heard here today. Do you understand me? It's the only conclusion that you can draw.

Now, Mr. Rogers wants to blame this whole thing on the police department. I don't know why they would want to pick on Lonnie Joe Carter but evidently that is what he is saying by telling you that this case could have been proved against Lonnie Joe perfectly if they had taken fingerprints. Well, I want to try to correct maybe a [123] misapprehension that you have. Fingerprints are not the crime fighting tool that you think they are. With items like this (picking up Commonwealth's exhibit, a hinge) this rough metal and this rough box (picking up box of hinges) and that fact that numerous people were out there and picked up that stuff would ruin any possibility of identifying fingerprints, but, secondly, the main thing was, this fellow had gloves. You heard them talk about that. They took the gloves away from him and they figured with gloves on there would be none. Mr. Rogers talked about the lab. The lab, it is true that we have a lab, but they serve as one lab and it is in Frankfort and it serves the entire state and it has been five months since this was sent up there and that is not an unreasonable time for them and he says to you that I could have continued the case until a later time. Well, I see no reason to. The proof seems to me to be here as good as it will ever be.

Now, I am going to ask you, as I have said before, satisfy yourselves, that if he didn't do this, why did he do all of these other things? You satisfy yourselves

of each one of these if you can before you turn him loose. And you are going to have to satisfy yourselves on what you have heard up here today. You look at each one of these events. Remember, they never lost sight of this man. Someone was watching him from the very time that he was squatted [124] down by that hole; where his two jackets were left. They watched him all the time and he run right through here (pointing to sketch on blackboard) and until he dumped off his police radio and his loot bag and was caught. Remember that, he was never lost.

We ask you to find the man guilty. It carries from one (1) to five (5) years and we are not going to ask that you be exceptionally rough on him just find the man guilty and give him a sentence of between one (1) and five (5) years.

Thank you.

THE COURT: Mr. Sheriff, you may show the jury to their jury room.

WHEREUPON, at this time the Sheriff showed the jury to their room and the instructions of the Court and exhibits of the Commonwealth were also given to one of the jurors as they left the courtroom.

After the jury had deliberated for quite sometime one of the jurors advised the Sheriff that the jury needed to ask the Court a question and at this time the Sheriff advised the Court of this fact and the Court advised * * *

* * * *

COMMONWEALTH'S EXHIBIT 15

## YOUR RIGHTS

Place Hopkinsville Pol. Dept.

Date 12/22/78

Time 2:11 A.M.

Before we ask you any questions, you must understand your rights:

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions, and have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

## WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions, I do not want a lawyer at this time. I understand and know what I am doing. No promise or threats have been made to me and no pressure or coercion of any kind has been used against me.

Suspect refused to answer questions.

Signature _____

Witness: C. R. Beard—#9

Witness: Illegible

Time: 02:18

RENDERED: May 13, 1980
Not to be published

SUPREME COURT OF KENTUCKY

No. 79-SC-452-MR

LONNIE JOE CARTER, APPELLANT

*v.*

COMMONWEALTH OF KENTUCKY, APPELLEE

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE STEPHEN P. WHITE, JUDGE

Indictment No. 79-CR-24

MEMORANDUM OPINION PER CURIAM

AFFIRMING

Lonnie Joe Carter, the appellant, was indicted by the February 1979, Christian County Grand Jury for third-degree burglary (KRS 511.040) of Young's Hardware Store in Hopkinsville, Kentucky. Appellant was also indicted as a persistent felony offender pursuant to KRS 532.080.

In the early hours of December 22, 1978, Officer Ellison of the Hopkinsville City Police Department, while on routine patrol through the downtown area, passed by the alley between Young's Hardware Store and Edna's Furniture Store and noticed something in the alley. When she flashed her spotlight down the alley she saw two black males kneeling in the alley. The men took off running and Officer Ellison radioed Officer Davis, who was also on patrol in the area. Officer Davis saw the two suspects running away and took off after them. The two men split up. Officer Davis pursued and caught one of them. It turned out to be Lonnie Joe Carter, the

appellant. During the course of the chase, the appellant dropped two objects, which turned out to be a gym bag and a police band portable radio. The appellant was wearing gloves but no jacket, despite the fact that it was a bitterly cold night.

After calling Officer Davis, Officer Ellison inspected the wall of the building and found a sizeable hole. She also noticed that some items of merchandise from inside the store had been removed and were in the alley. Also in the alley were two jackets. Upon hearing that Officer Davis had one of the men in custody, Officer Ellison went to where the man was being detained and noted that he had on the same color clothes as one of the men she had seen in the alley.

After being taken to police headquarters and being booked, the appellant was read his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)) and was asked by Officer Ellison and Davis if he would like to sign the standard waiver form and make a statement. The appellant indicated that he understood his rights, but that he did not care to make a statement at that time. Shortly thereafter, Rusty A. Colon, a Major with the Hopkinsville Police Department, entered the room and started a conversation with the appellant, during which the appellant made certain incriminating statements which are in issue in this appeal.

A trial was held on May 17, 1979, in the Christian Circuit Court at which the appellant was found guilty of third-degree burglary and of being a first-degree persistent felony offender. The appellant received sentences of two years and 20 years' imprisonment, respectively, for these convictions. On this appeal nine alleged errors are presented.

I

> "Appellant has been denied his rights against compulsory self-incrimination and to counsel in violation of the 5th, 6th and 14th amendments to the United States Constitution and Section 11 of the

Kentucky Constitution when the police failed to 'scrupulously honor' his decision to remain silent."

The record reflects that the appellant was, promptly after his arrest, advised of his Miranda rights by Officer Ellison. During her interrogation by the Commonwealth, Officer Ellison explained that the appellant refused to waive his Miranda rights, refused to make a statement, and requested a lawyer. Shortly thereafter, Major Colon, in the absence of the other officers, talked to appellant for a few minutes about the crime. Counsel for appellant did not object to this line of interrogation and, as a matter of fact, in his cross-examination pursued the same line of inquiry.

In Spillman v. Commonwealth, Ky., 465 S.W. 2d 925 (1971), this court was confronted with a situation similar to that now presented. In disposing of the issue, we said "(t)he failure to raise the question in the trial court precludes its consideration on appeal."

The appellant made no objection; consequently, the issue was not preserved for appellate review.

II

"Testimony by Officers Ellison and Davis that appellant refused to answer police questions and introduction of a Miranda waiver form indicating appellant refused to waive his rights deprive appellant of his federal and state constitutional rights to remain silent."

Counsel for appellant argues that in spite of his Miranda protection, the length of time it was brought to the attention of the jury constitutes a violation of this protection. We need not reach this charge since no objection was made at the time the issue first presented itself. Spillman v. Commonwealth, supra. The one and only objection made by appellant's counsel had nothing to do with Miranda-rights protection. It pertained to hearsay evidence contained in an answer. The Common-

wealth's Attorney asked Officer Ellison whether she had any conversation with the appellant about this crime. The following is reflected by the record:

> "A. No, sir, when we brought him down to the station he didn't want to say anything. There was another officer there who did say something about whose coats they were and Mr. Carter said that they were his coats.
>
> Objection by Hon. W. E. Rogers, III:
>
> Judge, I object to the hearsay.
>
> The Court:
>
> Yes, that is hearsay testimony and I believe you will have to get that from another party."

The court sustained the objection, and no request for an admonition was sought and none was given by the court. Evidently, counsel for appellant was satisfied with having his objection sustained without having the court admonish the jury. In this situation the issue is not preserved for appellate review. Brock v. Commonwealth, Ky., 391 S.W. 2d 690 (1965).

III

> "The trial court denied appellant due process of law and a fair trial by failing to hold an evidentiary hearing, out of the presence of the jury, regarding appellant's incriminating statements pursuant to RCr 9.78."

Counsel for appellant argues that RCr 9.78 mandates that the trial judge hold a hearing out of the presence of the jury before admitting incriminatory statements which were supposed to have been made by appellant after having been given his Miranda warning. RCr 9.78 provides that if there is a timely objection made to such testimony, then, and in that event, the court must hold such a hearing. In this case there was no objection. The

objection to which counsel for appellant makes reference appears in the Commonwealth's Attorney's opening statement to the jury. Remarks made by Commonwealth's Attorney in his opening statement are what he expects to prove. Objections to such statements do not obviate a challenge when the objectionable line of testimony is sought to be pursued in the course of the trial. The opening statement does not constitute the admission of evidence within the terms of RCr 9.78. This issue was not preserved for appellate review.

IV

> "The trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the 5th and 14th amendments and Section 11 of the Kentucky Constitution."

The appellant did not testify. His counsel argues in the alternative, the appellant was entitled to an instruction on his right to remain silent and not testify or if he is not entitled to such an instruction then, and in that event, the comments of the Commonwealth's Attorney in his closing summation to the jury concerning appellant's failure to testify were prejudicial error.

KRS 421.225 provides:

> "Testimony of defendant.—In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

In Green v. Commonwealth, Ky., 488 S.W. 2d 339 (1972), this court had under consideration a request by an accused that the court instruct the jury that no inference of guilt should be drawn from his failure to testify. This question was considered by this court and

we concluded that, "(t)he trial court did not err in refusing to give Green's requested instruction."

Appellant's latter argument that the comments of the Commonwealth's Attorney in his closing statement to the jury were prejudicially erroneous is no more meritorious than the argument for an instruction on his failure to testify. Counsel for appellant was afforded the privilege of making the first summation to the jury. The Commonwealth's Attorney was then afforded the privilege of concluding the arguments, readying the submission of the case to the jury for its consideration. The closing summation for the appellant commences as follows:

> "Ladies and Gentlemen of the Jury, I am sure you all right now are wondering well what has hapened? Why didn't Mr. Carter take the stand and testify? Let me tell you. * * * He doesn't have to take the stand in his own behalf. He doesn't have to do anything. * * *"

The comments of the appellant's attorney were an invitation for the Commonwealth's Attorney to attack, which he did. The error on the part of the court, if any, was at the invitation of appellant and he will not now be heard to complain. Wright v. Jackson, Ky., 329 S.W. 2d 560 (1959). Irrespective of the characterization made by appellant's counsel of the Commonwealth's Attorney's closing argument, there was no objection made to any of it. It is now too late to cry foul.

V

> "The trial court abused its discretion and denied appellant due process of law by permitting the Commonwealth to impeach appellant with prior felonies which were in issue during the second (P.F.O.) phase of the trial."

It is clear that the appellant did not take the stand; consequently, there was no impeachment.

The appellant also argues that after he had been found guilty of the primary offense, third-degree burglary, the court should have impanelled a new jury to hear the persistent felony charge. This argument was discussed in Brown v. Commonwealth, Ky., 551 S.W. 2d 557 (1977). We hold to the contrary. The trial court did not err in this respect.

VI

> "The trial court denied appellant due process of law by refusing to declare a mistrial and by refusing to exclude incriminating statements when it became clear that the prosecutor had not disclosed physical evidence and incriminating statements as requested."

Appellant filed a request for a bill of particulars on February 28, 1979. One of the requests was "A copy of any statement, written or oral, made by the Defendant or any co-defendants." In response, the Commonwealth's Attorney answered "None." The incriminating statements to which counsel for appellant now refers are those to which the Commonwealth's Attorney made mention in his opening statement. We have heretofore opined that the issue as to the competency of the incriminating statements was not properly preserved for appellate review since appellant's counsel had not objected when the questioned testimony was offered.

The request for the bill of particulars filed was sufficiently broad in other sections thereof to have required that their existence and the intent of the Commonwealth's Attorney to use them on trial should have been disclosed to counsel for appellant with the other disclosures. This was not done. The existence of the gloves was made known in the testimony of Officer Davis and was pursued in the cross-examination by appellant's counsel. No objection was made when the question arose; however, at the conclusion of Officer Davis' testimony, appellant's counsel made a motion for a mistrial, which was denied.

Objections to a particular question or to a particular line of interrogation must be made when the testimony is offered. No objection was made when Officer Davis disclosed the existence of the gloves. The objection was first made after this witness had been interrogated both by the Comomnwealth's Attorney and the appellant's counsel. Appellant cannot now complain.

VII

> "The trial court denied appellant due process of law by instructing the jury that pre-trial incarceration would count toward any sentence imposed and by refusing to instruct the jury regarding the ten year mandatory sentence without parole for first degree persistent felons.

*A. Pre-trial incarceration*"

In appellant's closing argument to the jury his counsel said:

> "Now, I want to tell you something. The police and the prosecution and the state are not helpless. Now, this man (again pointing to defendant) is helpless. He has been in jail five (5) months while they have had the laboratories and the investigators and that's good; I am glad that we have that. * * *"

After the case was submitted to the jury for a verdict, the jurors returned into open court and asked:

> "We would like to know if time served now will be included in the sentence or if. . .
>
> The Court:
>
> Do you mean to be asking me whether or not he will be given credit for that time? Is that what you are saying?

Terry Hamby—one of the jurors:

Yes, sir.

The Court:

Let me say to you, Ladies and Gentlemen, that ordinarily I wouldn't answer that question except for one fact and that is, his confinement in the local jail prior to this trial, I believe it was five (5) months or something of that sort, was mentioned in the final argument in the case. That is where you got it. If that had not happened I think probably I would not be permitted to answer your question, but since it happened in the way it did I am simply going to tell you that under Kentucky Revised Statutes, Section 532.120, subsection 3, reads as follows:

> 'Time spent in custody prior to commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the Court imposing sentence towards the serving of the maximum term of imprisonment.'

That's the end of the quotation but to simplify that, to bring it down to what you and I understand, 'yes, he gets credit for time served.' "

After the jury returned to the jury room, counsel for appellant and the trial judge had the following colloquy:

"Motion by Hon. W. E. Rogers, III:

Judge, I object to that request and move for a mistrial on that basis:

The Court:

I will overrule the motion. Mr. Rogers, you are the one that brought up the five (5) months that defendant has been in jail."

The error, if any there was, on the part of the trial judge was invited by appellant's counsel and he cannot now complain.

*"B. Mandatory No-Parole Term"*

At the conclusion of the persistent felony phrase of the trial, counsel for appellant requested the court to inform the jurors that under the law a conviction of being a persistent felon would prohibit the defendant from receiving probation or parole and they should take that into consideration in setting their sentence. KRS 532.080(7). The court refused to give such an admonition to the jury. The function of the jury is to determine guilt or innocence and to determine sentence if guilt is found. The possibility of pardon or parole is not a proper consideration for the jury in making its determination. In fact, the entire matter of parole is beyond the province of the jury. Brown v. Commonwealth, Ky., 445 S.W. 2d 845 (1969); Green v. Commonwealth, Ky., 556 S.W. 2d 684 (1977). Since the entire matter of parole is beyond the province of the jury, it is clear that the trial judge is under no obligation to instruct the jury on this matter.

VIII

"Appellant was denied due process by the failure of the trial judge to instruct as requested by the defense that the Commonwealth had the burden to prove each essential element beyond a reasonable doubt."

The trial court in instructing on reasonable doubt said:

"You will find the defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this County on or about the 22nd day of December, 1978, and before the finding of the indictment herein, he entered the store building known as Young's Hardware at 112 East 6th Street in the City of Hopkinsville without permission from

the owner or any other person authorized to give such permission;

(b) That in so doing he did not have such permission;

and

(c) That he did so with intention of committing a theft."

The appellant argues that the court should have instructed the jury that it must believe each element of the offense beyond a reasonable doubt before a conviction can be had rather than relying on the preliminary statement of reasonable doubt to apply to each element of the offense. We are of the opinion that today's jurors are sophisticated enough to realize that the reasonable doubt qualification given at the beginning of each separate instruction applies with equal force to each element of the offense thereafter set forth in that instruction. The instructions given by the court properly presented the reasonable doubt requirement.

IX

"Appellant was denied due process of law in violation of the 14th amendment by the entire P.F.O. hearing, because there was no proof, or instructions on, essential elements of the offense, no instruction on 2nd degree PFO, evidence of other unrelated charges and/or another conviction, and an admission of guilt by counsel without an on the record inquiry of appellant."

This argument is directed solely at the persistent felony phase of the trial. Appellant now complains that, (1) the circuit court clerk read to the jury from the indictments; (2) there was no proof of at least two essential elements of the crime with which the appellant was charged; (3) the essential elements of the offense were omitted from the court's instructions; and (4) the

instructions did not afford the jury the privilege of determining whether the appellant had committed only one of the previous convictions.

Counsel for appellant did not offer any objection to the clerk's reading from the indictments, nor to the failure of the proof, nor to the instructions themselves. The integrity of the appellant in admitting what the Commonwealth had already proved does not detract from his plea for mercy for appellant. It logically would improve the appellant's chances for a minimum sentence from the jury.

When the alleged errors are stacked one on top of the other, it appears to us that the appellant received a fair trial, at least a tolerably fair trial. Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974); MacDonald v. Commonwealth, Ky., 554 S.W. 2d 84 (1977); Berning v. Commonwealth, Ky., 550 S.W. 2d 561 (1977).

The judgment is affirmed.

All concur, except Stephens, J., who did not sit.

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# SUPREME COURT OF THE UNITED STATES

No. 80-5060

LONNIE JOE CARTER, PETITIONER

*v.*

KENTUCKY

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1980

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